REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO. 04A OF 2019

JULIUS MOMANYI MOCHELE...APPELLANT

VERSUS

JUMBO NORTH (E.A) LTD..RESPONDENT

J U D G E M E N T

1. By a Memorandum of Appeal filed on 20th July, 2018 the appellant herein faulted the Judgment of the trial Court (Hon. Nicodemus N. Moseti) on ground *inter alia*.

(a)That, the Honourable trial Magistrate erred in law and in fact in failing to adequately analyze the scope of respondent's negligence yet the appellant had proved that he was an employee of the respondent and was injured while on duty at the respondent's premises.

(b) That, the learned trial Magistrate erred in law and in fact in failing to recognize that the respondent was negligent in failing to provide a safe working environment for the appellant.

(c) That, the learned trial Magistrate erred in law, and in fact, in failing to hold the respondent negligent for failure to maintain the machine the appellant was working on at a good working condition.

(d) That the learned trial Magistrate erred in law, and in fact, in dismissing the appellant's case on the grounds that negligence was not proved yet the appellant had proved that he was the respondent's employee and therefore, the respondent owed hi a duty of care to provide him with a safe working environment and maintain the machine in good condition.

(e) That, the learned trial Magistrate erred in law, and in fact, in holding that an helmet could not prevent the appellant's injury yet the helmet was mentioned only as an example of the protective gear the appellant ought to have been provided with as safeguard measures and in exercise of duty of care.

(f) That, the respondent did not tender in evidence in the lower court to rebut the appellant's testimony which was on oath.

2. The appellant therefore prayed that:

(a) This honourable court allow the appeal, and set aside the honourable trial Magistrate's findings, and order, made in his judgment delivered on 18th July, 2017, and replace the same with its own findings and judgment based on the plaintiff's submissions in the lower court, and the grounds herein.

(b) Costs both in the lower court and of this appeal be awarded to the appellant together with interest from the date of judgment in the lower court at 14%.

3. In the submissions in support of the appeal, the late Andambi for the appellant submitted among others that the defendant did not call any witness to rebut the plaintiff's case hence the Court became speculative when the learned Magistrate in his judgment stated that most helmets have openings on the front side of the eye. According to counsel, what the trial Magistrate failed to note was that even the opening part of the helmet sometimes have a plastic transparent cover as the front.

4. Mr. Andambi further submitted that the learned Magistrate seemed to have agreed with the plaintiff that the defendant did not provide protective gear to wit a helmet. It was therefore not necessary for the plaintiff to explain to the court that the helmet could have prevented and or lessened the impact of the injury.

5. On the issue of quantum, counsel submitted that the Court should find that the possible award of Ksh. 80,000/= proposed by the trial Magistrate was on the lower side noting that injury to the eye was sensitive. Counsel instead proposed an award of Ksh.250,000/= Counsel further sought to be awarded the costs of the appeal.

6. In the submissions opposing the appeal, Mr. Mukhabane for the respondent submitted that failure by the respondent to call witnesses did not in any way discharge the appellant from his duty of strictly proving his case for negligence against the respondent. On this point, counsel relied on the case of **Karugi & Another -v- Kebiya & 3 others [1987] KLR 347** and further section 107 of the Evidence Act. According to counsel, the question of liability would only arise upon the appellant proving negligence against the respondent.

7. Relying on the case of **Oluoch Eric Gogo vs Universal Corporation Ltd [2015]eKLR** Counsel submitted that the burden of proof is primarily on the plaintiff who must prove that the defendant owed him or her a duty of care, there was breach of that duty and as a result of the breach, injury arose. Further there has to be a causal connection between the breach of duty and the injuries sustained.

8. According to Counsel, the learned trial Magistrate having addressed his mind to the above mentioned prerequisites with regards to negligence against the respondent, the said findings were merited.

9. On the issue of breach of duty of care, Counsel submitted that the respondent never breached any alleged duty of care it owed the appellant. The appellant in its plaint outlined particulars of negligence to include:

(a) Failing to take adequate precaution for the safety of the plaintiff while he was engaged upon the said work.

(b) Exposing the plaintiff to risk of injury or damage which it knew or ought to have known.

(c) Failing to provide and maintain adequate or suitable plant and equipment to enable the plaintiff carry out the work safely

(d) Failing to provide safe working place

(e) Failing to take any measures to prevent the plaintiff from injury or at all.

10. Counsel submitted that whereas the appellant was expected to by law to prove the alleged particulars of negligence by the respondent, no evidence was led by himself at all in proof of the said particulars of negligence. The appellant did not even attempt to state the safety particulars that the respondent failed to provide him with that occasioned the happening of the alleged accident that caused him injury. The much he told the Court was that he was a machine operator and that he was operating a twisting machine when a metal bar boke and hit him on the eye.

11. Mr. Mukhabane further submitted that the mere fact that an accident had occurred at work place of itself was not proof that the employer was negligent and thus liable for the accident. The employee at all times is expected to exercise reasonable care in executing his/her duties at work place. Besides the trial Magistrates observed that the appellant was in full control of how he placed the metal bars in the twisting machine which was a strong inference that the appellant must have been negligent in the manner in which he placed the metal bar on the twisting machine for it to have broken. In this regard Counsel relied on the case of **John Njuguna -v- Eastern Produce (K) Ltd (Savani Tea Estate [2014]eKLR.**

12. On the issue of quantum, Counsel submitted that the proposed award of Ksh.80,000/= was commensurate with the plaintiff's injuries.

13. This is a first appeal and the mandate of the court was set out in **Selle -v- Associated Boat Co. of Kenya & Others [1968] EA123** where it was stated.

> **"an appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression or the demeanor of witness is inconsistent with evidence generally."**

An appeal to this Court from the trial court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

14. The appellant contends that the learned trial Magistrate erred in law and fact in failing to adequately analyze the scope of the respondent's negligence yet the appellant had proved that he was an employee of the respondent and was injured while on duty at the respondent's premises.

15. On the issue of whether the appellant was the respondent's employee, at page 45 of the record of appeal, the appellant stated that he was employed by the respondent and produced as **Pexh1,** his employment card. This was not contested by the respondent therefore the injury which was also not disputed took place on 3rd September, 2015 while the claimant was at work. The learned trial Magistrate did not consider and make any finding on this fact hence it can be safely presumed that since the respondent never seriously contested the fact that the appellant was its employee, the issue no longer required to be decided upon. Therefore, nothing much turns on the ground of appeal.

16. Grounds 2 and 3 of the appeal are more or less similar hence will be considered together. That is to say, the appellant complained that the learned trial Magistrate erred in law and in fact in failing to recognize that the respondent was negligent in failing to provide a safe working environment for the appellant and that he erred in fact and law in failing to hold the respondent negligent for failure to maintain the

machine the appellant was working on in good working condition.

17. On this issue, the learned trial Magistrate at page 51 to 52 of the record of appeal found as follows:

> **"I have considered the plaintiff witnesses testimonies exhibits in support of the plaintiff' case as well as submissions by both parties. Section 109(sic) of the evidence Act is in this terms. The burden of proof as to any particular fact lies on the person who wishes the court to believe on its existence, unless provided by law that the proof of the fact shall lie on any particular person. This is not one of those cases where the doctrine of Res liquitor applies. The plaintiffs therefore has a duty to prove that the defendant was negligent. All the plaintiff stated is that he placed a metal bar to a twisting machine and hit him on the forehead and that because the metal was defective, it broke flew, it must be noted that the plaintiff was in full control on how he placed metal bars in the twisting machine. The metal hit him on the upper eyelid. It has not been explained how a helmet could have prevented the injury since most helmets have apertures on the front side of the eye."**

Having made the above observations, the learned trial Magistrate became of the view that the plaintiff failed to prove negligence against the defendant.

18. Section 6(1) of Occupational Safety and Health Act, 2007 provides.

(a) Every occupier shall ensure the safety, health and welfare at work of all persons working in his workplace Subsection (2) goes on to detail the duties cast upon the occupier.

19. The responsibilities conferred by this section are statutory.

Whereas the learned trial Magistrate observed that the plaintiff was in full control on how he placed the metal bars on the twisting machine and further that even if the plaintiff was provided with a helmet, it was not demonstrated how a helmet could have prevented the injury since most helmets have apertures on the front side of the eye, it is noteworthy that the respondent never called any witnesses or tendered any evidence to demonstrate that despite the fact that the respondent complied with Section 6(1) and (2) of the Occupational Safety and Health Act, 2007, (OSH-Act) the appellant still got injured.

20. As observed earlier, the obligation placed upon an occupier in this case the appellant, are statutory hence mandatory. Therefore in order to shift the blame on an employer for negligence, the employer must show it complied with the minimum standards provided for under Section 6(1) and (2) of the OSH Act, 2017. This was not demonstrated in this particular case. The observation by the learned trial Magistrate that even if a helmet was provided, the appellant could still have been injured because helmets have apertures in the front side was not only speculative but also casted the trial Magistrate as entering the trial arena and playing a defense Counsel on behalf of the respondent.

21. From the foregoing the Court is persuaded that the appeal is merited and therefore sets aside the finding of learned trial Magistrate that the appellant failed to prove negligence and substituting therewith a finding that the respondent was liable for negligence as a consequence of which the appellant got injured.

22. On the issue of quantum, the learned trial Magistrate observed that the appellant suffered soft tissue injuries and had the case succeeded, he would have awarded the appellant Ksh.80,000/= in general damages and special damages at Ksh. 9,300/=.

23. The Court has reviewed and considered the authorities relied on by both Counsel for the appellant and respondent during the trial on the issue of quantum and is persuaded that the assessment by the learned trial Magistrate was commensurate with the injuries sustained by the appellant and hereby upholds the same.

24. In conclusion, the Court hereby allows the appeal as stated above.

25. The appellant shall further have the costs of the Appeal as well as costs in the trial Court.

26. **It is so ordered.**

DATED AND DELIVERED AT ELDORET THIS 25TH DAY OF FEBRUARY, 2022

ABUODHA NELSON JORUM

JUDGE ELRC